MASTER BRISBANE ITANG

v.

ROBINSON LEE & ORS

COURT OF APPEAL, PUTRAJAYA
HISHAMUDIN MOHD YUNUS JCA
ABDUL WAHAB PATAIL JCA
BALIA YUSOF WAHI JCA
[CIVIL APPEAL NO: Q-01-443-10-2012]
11 OCTOBER 2013

TORT: *Negligence - Duty of care - Failure to vaccinate pupils of school against Japanese Encephalitis (JE) virus - Whether there is specific legislation imposing duty on Ministry of Health to immunise school pupils - Whether there had been recent outbreak of JE virus in areas nearby school - Implementation of vaccination program - Whether required cooperation of other governmental agencies - Shortages of vaccines and budget constraints - Factors considered - Whether fair and reasonable to impose common law duty of care on Ministry of Health to immunise plaintiff - Whether would open floodgate of litigation*

This was an appeal against the decision of the High Court dismissing the appellant's/plaintiff's claim against the respondents/defendants for damages for the tort of negligence. At the material time, the plaintiff was 10 years old and attending a primary boarding school ('the school') situated near a pig farm. On 30 September 2006, after a few days of having high fever, the plaintiff was diagnosed with the Japanese Encephalitis ('JE') virus. It was not disputed that pigs are the natural hosts of the JE virus; and that from pigs, the virus may be transmitted to human beings *via* the culex mosquitoes. As a result of the infection, the plaintiff suffered brain damage and was permanently disabled physically and mentally and required a lifetime of care. The issue that arose for consideration was whether in light of the Circular and Guidelines of the Ministry of Health, the Department/Ministry of Health (and vicariously, the Government of Malaysia) was liable in negligence for the failure to vaccinate the pupils of the school against the JE virus, considering the proximity of the school to a pig farm.

Held (dismissing appeal with costs)
Per Hishamudin Mohd Yunus JCA delivering the judgment of the court:

(1) There is no specific legislation imposing a statutory duty or obligation on the part of the Department/Ministry of Health to immunise school pupils against the JE virus. The Department/ Ministry of Health thus did not owe a duty of care to the plaintiff to ensure that he would be immunised against being infected with the JE virus. It would not be fair, just and reasonable to impose a common law duty of care on the Department/Ministry of Health to ensure that the plaintiff would be immunised against being infected with the JE virus. (paras 19 & 23)

(2) There had not been a recent outbreak of JE virus infections in the areas nearby to the school prior to the plaintiff being infected. In fact, the immunisation program covered the whole country, and the implementation of the policy or program required the cooperation of other Governmental Agencies. There were also shortages of vaccines and budget constraints. To impose any common law duty of care on the Department/ Ministry of Health under such circumstances would have far reaching implications: it would, in future, be opening a floodgate of litigation against the Department/Ministry of Health. (para 23)

Bahasa Malaysia *Translation of Headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi menolak tuntutan perayu/plaintif terhadap responden/defendan untuk ganti rugi bagi tort kecuaian. Pada masa material, plaintif berumur 10 tahun dan menghadiri sebuah sekolah rendah berasrama ('sekolah') yang terletak berdekatan dengan sebuah ladang babi. Pada 30 September 2006, selepas beberapa hari mengalami demam panas, plaintif telah didiagnosiskan dengan penyakit virus Japanese Encephalitis ('JE'). Tidak dipertikaikan bahawa babi adalah pembawa semulajadi virus JE; dan virus boleh ditransmisikan kepada manusia melalui nyamuk *culex*. Akibat jangkitan tersebut, plaintif telah mengalami kerosakan otak dan lumpuh secara kekal dari segi fizikal dan mental dan memerlukan penjagaan sepanjang hayat. Isu yang dibangkitkan untuk pertimbangan adalah sama ada berdasarkan Pekeliling dan Garis Panduan Kementerian Kesihatan,

Jabatan/Kementerian Kesihatan (dan Kerajaan Malaysia secara vikarius) adalah bertanggungjawab dalam kecuaian atas kegagalan untuk memvaksinkan murid-murid sekolah itu menentang virus JE, memandangkan sekolah itu berdekatan dengan sebuah ladang babi.

Diputuskan (menolak rayuan dengan kos)
Oleh Hishamudin Mohd Yunus HMR menyampaikan penghakiman mahkamah:

(1) Tidak terdapat undang-undang tertentu yang mengenakan kewajipan berkanun dan obligasi kepada Jabatan/Kementerian Kesihatan untuk mengimunkan murid-murid sekolah terhadap virus JE. Jabatan/Kementerian Kesihatan dengan itu tidak mempunyai kewajipan berjaga-jaga terhadap plaintif untuk memastikan dia diberikan imunisasi daripada dijangkiti virus JE. Ia tidak adil dan munasabah untuk mengenakan kewajipan berjaga-jaga dari segi common law ke atas Jabatan/Kementerian Kesihatan untuk memastikan bahawa plaintif diberikan imunisasi daripada jangkitan virus JE.

(2) Tidak terdapat wabak virus JE di kawasan berdekatan dengan sekolah itu sebelum plaintif dijangkiti. Malahan, program imunisasi meliputi seluruh negara, dan pelaksanaan dasar atau program memerlukan kerjasama agensi-agensi kerajaan lain. Juga, terdapat kekurangan vaksin dan kekangan bajet. Pengenaan apa-apa kewajipan common law ke atas Jabatan/Kementerian Kesihatan dalam keadaan seperti ini akan menyebabkan implikasi-implikasi yang mendalam; ia akan, pada masa akan datang, menyebabkan benteng litigasi terhadap Jabatan/Kementerian Kesihatan terbuka.

Case(s) referred to:
Caparo Industries Plc v. Dickman & Others [1990] 2 AC 605 ***(refd)***
Loh Chiak Eong & Anor v. Lok Kok Beng & Ors [2012] 9 CLJ 699 CA ***(refd)***
Sutherlands Shire Council v. Heyman and Another [1985] 60 ALR 1 ***(foll)***

For the appellant - Shankar Ram Asnani (Daniel Ling with him); M/s Thomas, Shankar Ram & Co
For the respondents - Mohd Taufik Mohd Yusoff; SFC

[Appeal from High Court, Kuching; Suit No: 22-119-2010]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Hishamudin Mohd Yunus JCA:

[1] This is an appeal against the decision of the High Court of Kuching of 18 September 2012.

B

[2] The learned judge of the High Court had dismissed the appellant's/plaintiff's claim against the respondents/defendants for damages for the tort of negligence.

C **[3]** We heard this appeal on 19 June 2013, and we reserved judgment.

[4] Today, we deliver our judgment.

[5] We, unanimously, dismiss this appeal with costs.

D

[6] At the High Court, six defendants were named. However, at the hearing of this appeal, the appellant/plaintiff focused liability only on the fourth and sixth respondents (the Director-General of Health of the Ministry of Health and the Government of Malaysia, E respectively). The claims against the other respondents/defendants were abandoned.

[7] Hereinafter, in this judgment, we shall be referring to the appellant/plaintiff as the 'plaintiff' and the respondents/defendants as the 'defendants'.

F

[8] The plaintiff commenced the action by his next friend, his father (Itang Anak Lang), as at the time of filing the action, he was an infant.

G **[9]** The facts of the case that led to the filing of the writ action for negligence are these.

[10] At the material time the plaintiff was ten years old. He lived with his parents, grandmother and siblings at a village called 'Kampong Danau Melikin, Balai Ringin', in the District of Serian, H Sarawak. He attended a primary boarding school called 'Sekolah Kebangsaan (Cina) Sungai Menyan, Serian' ('the school'). The plaintiff was admitted to the school in 2003. The school was situated near a pig farm. The pig farm was less than 2km away from the school.

I

[11] On Monday 25 September 2006, the plaintiff came down with fever. His teacher, the first defendant, sent the plaintiff to the government clinic at Balai Ringin for treatment. At the clinic, the medical staff who attended to him, prescribed some panadols and a cough syrup; and, thereafter, the first defendant took the plaintiff back to his village, as it was the practice of the school to send a sick pupil back to his/her home. On 28 September, the plaintiff's mother, seeing the plaintiff being very sick, sent him to the Serian District Hospital. There, he was treated for suspected meningitis. His condition, however, got worse. So, on 30 September he was transferred to the Sarawak General Hospital (SGH) where he was diagnosed to have been infected with the Japanese Encephalitis (JE) virus.

[12] As a result of the infection, the plaintiff suffered brain damage. He is permanently disabled physically and mentally and requires lifetime care.

[13] The learned trial judge made a finding that on a balance of probabilities the plaintiff was infected with the JE virus at the school, by reason of the school being located near a pig farm. However, he ruled that the Department/Ministry of Health was not liable in negligence.

[14] It is not disputed that pigs are the natural hosts of the JE virus; and that from pigs the virus may be transmitted to human beings *via* the culex mosquitoes. It is also not in dispute that the plaintiff's school is a high-risk area (for JE infection) by reason of its proximity to a pig farm.

[15] The school is under the responsibility of the Ministry of Education. However, the authority responsible for the health of the pupils at the school was the Department of Health of Sarawak, which is under the Federal Ministry of Health.

[16] There was an outbreak of the JE virus in the District of Serian, Sarawak, in 1992.

[17] In 2001 there was a circular and guidelines issued by the Ministry of Health dated 10 May 2001 directing the Department of Health of Sarawak to immunise, among others, children of 1-15 years of age, living within pig farms or in areas within two kilometres of pig farms, against the JE virus. This circular and guidelines, although issued in 2001, was implemented in the State

of Sarawak in January 2002. It is not in dispute, however, that, the implementation of the circular and guidelines was carried out at a very slow pace in Sarawak as the implementation of the immunisation program required the cooperation of other ministries and departments, such as the Education Department and the Education Ministry. Moreover, there were problems in the implementation of the program due to shortage of vaccines and shortage of governmental funds. Thus, in spite of the 2001 circular and guidelines, at the time of the plaintiff's infection, the pupils of the school, were yet to be vaccinated against the JE virus.

[18] At the material time, the plaintiff was the only person at the school infected with the JE virus. There is, however, no evidence that prior to the incident (that is, the plaintiff's infection) there has been an outbreak of the JE virus on any premises near the school.

[19] It is not in dispute that there is no specific legislation imposing a statutory duty or obligation on the part of the Department/Ministry of Health to immunise school pupils against the JE virus.

[20] The only issue in this appeal is whether in the light of the circular and guidelines of the Ministry of Health, the Department/Ministry of Health (and, vicariously, the Government of Malaysia) is liable in negligence for the failure to vaccinate the pupils of the school against the JE virus, considering the proximity of the school to a pig farm.

[21] In dealing with this issue, we begin by asking ourselves this question: on the facts of the case, should we rule that the Department/Ministry of Health owe a duty of care to the plaintiff to ensure that he would be immunised against being infected with the JE virus? To put it in another way: on the facts of the case, is it fair, just and reasonable that the law should impose such a duty of care on the Department/Ministry of Health (see the judgment of Lord Bridge of Harwich in *Caparo Industries Plc v. Dickman & Others* [1990] 2 AC 605 (HL); followed by this court in *Loh Chiak Eong & Anor v. Lok Kok Beng & Ors* [2012] 9 CLJ 699; [2013] 1 MLJ 27).

[22] The plaintiff submits that by reason of the circular and the guidelines issued by the Ministry of Health, and considering the proximity of the school to a pig farm, there was a breach of the common law duty of care on the part of the Department of Health/Ministry of Health *vis-à-vis* the plaintiff when it fails to vaccinate the plaintiff against the JE virus.

[23] In our judgment, we hold that the Department/Ministry of Health did not owe a duty of care to the plaintiff to ensure that the plaintiff would be immunised against being infected with the JE virus. Having considered the circumstances of the case, we prefer to adopt a more cautious approach in deciding whether or not to impose any liability on the Department/Ministry of Health in relation to the plaintiff. We take the position that it would not be fair, just and reasonable to impose a common law duty of care on the Department/Ministry of Health to ensure that the plaintiff would be immunised against being infected with the JE virus. Firstly, there had not been a recent outbreak of JE virus infections in areas nearby to the school prior to the incident. Secondly, the immunisation program covers the whole country, and the implementation of the policy or program required the cooperation of other governmental agencies. Thirdly, there were the shortages of vaccines and budget constraints. Finally, to impose any common law duty of care on the Department/Ministry of Health under such circumstances will have far reaching implications: it would, in future, be opening a floodgate of litigation against the Department/Ministry of Health. In the Australian High Court case of *Sutherlands Shire Council v. Heyman and Another* [1985] 60 ALR 1 it was said:

> A public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constrains.

[24] In our view, the above principle should apply to the present case.

Appeal dismissed with costs of RM10,000; deposit refunded to the appellant.